

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STEVEN D. BAUDER,

Plaintiff,

v.

BERNIE DENNEHY,

Defendant.

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CASE NO. C10-1248-RSL

REPORT AND RECOMMENDATION

Pro se plaintiff Steven D. Bauder, proceeding *in forma pauperis*, alleges that defendant Bernie Dennehy, Corrections Program Administrator at King County Correctional Facility (“KCCF”), violated 42 U.S.C. § 1983 and the First Amendment by denying plaintiff a kosher diet. (Dkt. 7.) Defendant moves to dismiss because plaintiff failed to exhaust administrative remedies as is required by the Prison Litigation Reform Act (“PLRA”), 42 U.S.C. § 1997e(a); and moves for summary judgment based on qualified immunity and on the merits. (Dkt. 13.) The Court recommends DISMISSING this matter without prejudice for failure to satisfy PLRA exhaustion, and for mootness because plaintiff seeks only injunctive relief and is no longer

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01 incarcerated at KCCF.¹ The Court need not address summary-judgment questions regarding
 02 qualified immunity and the merits.

03 BACKGROUND

04 Plaintiff was incarcerated in KCCF from April 2008 to January 2011 on the charge of
 05 murder.² (Dkt. 14, at 1–5.) Plaintiff’s claim in full is: “I was denied the kosher diet because,
 06 according to the King County Jail, I was unable to sufficiently prove that I am, in fact, a Jew.”.
 07 (Dkt. 7, at 3.) Defendant submits that plaintiff made several requests for kosher meals in
 08 August 2010 that were denied due to the vague and insufficient nature of the requests and
 09 plaintiff’s failure to clarify in response to requests to do so. (Dkt. 16.) Plaintiff never grieved
 10 his denied requests for kosher meals. (Dkt. 16, at 5.) Plaintiff seeks only injunctive relief: for
 11 “King County Jail to recognize my faith and provide me with the properly cleansed food of the
 12 kosher diet and a yarlmuka [sic].” (Dkt. 7, at 4.) Plaintiff is now incarcerated at Clallam Bay
 13 Corrections Center.

14 DISCUSSION

15 Defendant argues that this matter should be dismissed because plaintiff did not exhaust
 16 his administrative remedies.³ Defendant is correct and the Court construes plaintiff’s failure to
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18 ¹ The Clerk is **DIRECTED** to correct plaintiff’s address as follows: Steven D. Bauder, DOC Number
 346344, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.

19 ² Plaintiff subsequently pleaded guilty to first-degree murder and was sentenced to 320 months of
 20 imprisonment. (Dkt. 14, at 2, 7–11.)

21 ³ Although the title of defendant’s motion refers only to summary judgment, within the motion he clearly
 22 moves to dismiss for failure to exhaust administrative remedies. (*Compare* Dkt. 13, at 1 *with* Dkt. 13, at 6–7.)
 The failure to exhaust such non-judicial remedies is subject to an unenumerated Rule 12(b) motion to dismiss
 rather than a motion for summary judgment. *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003). This is
 because summary judgment is on the merits, whereas dismissal for failure to exhaust administrative remedies is
 not on the merits. *Id.* However, in deciding a motion to dismiss for failure to exhaust, a court may look beyond

01 respond as an admission that defendant's motion has merit. *See* Local Rule CR 7(b)(2).
02 Furthermore, this matter is now moot: plaintiff asks that KCCF provide him with kosher meals,
03 but he is no longer incarcerated at KCCF.

04 The PLRA created a requirement that prisoners exhaust administrative remedies within
05 the prison grievance system before filing a civil-rights lawsuit regarding prison conditions:

06 No action shall be brought with respect to prison conditions under section 1983
07 of this title, or any other Federal law, by a prisoner confined in any jail, prison,
08 or other correctional facility until such administrative remedies as are available
are exhausted.

09 42 U.S.C. § 1997e(a). According to the United States Supreme Court, such “[e]xhaustion is no
10 longer left to the discretion of the district court, but is mandatory.” *Woodford v. Ngo*, 548 U.S.
11 81, 85 (2006). The exhaustion requirement applies even where the relief sought—monetary
12 damages—cannot be granted by the administrative process. *Id.* at 85; *Booth v. Churner*, 532
13 U.S. 731, 733 (2001). Administrative exhaustion is required for any suit challenging prison
14 conditions, not just for suits under § 1983. 42 U.S.C. § 1997e(h); *Porter v. Nussle*, 534 U.S.
15 516, 524 (2002). The requisite exhaustion is “proper exhaustion,” which “demands
16 compliance with an agency’s deadlines and other critical procedural rules because no
17 adjudicative system can function effectively without imposing some orderly structure on the
18 course of its proceedings.” *Ngo*, 548 U.S. at 90–91. If administrative remedies have not been
19 exhausted at the time an action is brought, it must be dismissed without prejudice. *See Wyatt v.*
20 *Terhune*, 315 F.3d 1108, 1120 (9th Cir. 2003); *McKinney v. Carey*, 311 F.3d 1198, 1199 (9th
21 the pleadings and decide disputed issues of fact, a procedure closely analogous to summary judgment. *Id.* at
22 1119–20 & n.14. Thus, whether a party moves for summary judgment or for dismissal for failure to exhaust
administrative remedies, a court will employ the same standard of review. The proper remedy for a prisoner’s
failure to exhaust is dismissal of his claim without prejudice. *Id.* at 1120.

01 Cir. 2002) (per curiam). Failure to satisfy the PLRA exhaustion requirement is an affirmative
02 defense as to which the defendant has the burden of proof. *Wyatt*, 315 F.3d at 1119.

03 Defendant has carried his burden of showing that plaintiff did not properly exhaust his
04 administrative remedies with respect to his Free Exercise claim. Although plaintiff made
05 several requests for a kosher meal that defendant denied for insufficiency of detail, plaintiff
06 failed even to take the first step of filing a grievance about any of these denials. (Dkt. 16, at 5.)
07 Nothing plaintiff has presented suggests that he was impeded by any person or entity from
08 pursuing such grievances.

09 Plaintiff's 42 U.S.C. § 1983 complaint should be dismissed without prejudice for failure
10 to exhaust administrative remedies as is required by the PLRA. It should also be dismissed as
11 moot because plaintiff is no longer incarcerated at KCCF and defendant therefore cannot
12 provide plaintiff with the injunctive relief that he seeks in the form of kosher meals.

13 CONCLUSION

14 The Court recommends DISMISSING this matter without prejudice for failure to
15 satisfy PLRA exhaustion, 42 U.S.C. § 1997e(a), and for mootness. A proposed order is
16 attached.

17 DATED this 31st day of May, 2011.

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20 Mary Alice Theiler
21 United States Magistrate Judge
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